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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 ANTHONY WILLIAM TREVINO,) Civil No. 94cv1913 IEG(RBB)
12)
13) Petitioner,)
14)
15) v.) **REPORT AND RECOMMENDATION RE:**
16) **DENYING FIRST AMENDED PETITION**
17) **FOR WRIT OF HABEAS CORPUS**
18) **[DOC. NO. 11]**
19)
20) MICHAEL EVANS, Warden,)
21)
22) Respondent.)
23)
24)
25)
26)
27)
28)

17 Anthony William Trevino filed his Petition for a Writ of
18 Habeas Corpus on December 21, 1994 [doc. no. 1]. The Petition was
19 dismissed on September 8, 1995 [doc. no. 6, 7]. In an unpublished
20 decision filed on November 15, 2005, the Ninth Circuit reversed the
21 district court and ordered that the First Amended Petition be
22 considered on its merits [doc. no. 41].

23 Trevino, a state prisoner represented by counsel, submitted a
24 First Amended Petition for Writ of Habeas Corpus [doc. no. 11]
25 which was filed nunc pro tunc to January 29, 2004. Petitioner
26 asserts three claims for relief: (1) The trial court's denial of
27 Trevino's motion for a continuance prevented him from receiving
28 effective assistance of counsel; (2) his attorney's failure to seek

1 severance of Petitioner's trial from his codefendants denied him
 2 effective assistance of counsel; and (3) he received ineffective
 3 assistance when his attorney objected to giving accomplice jury
 4 instructions. (Am. Pet. 4-12.)

5 I. FACTUAL BACKGROUND

6 On December 2, 1991, Robert Connelly was driving south on
 7 Interstate 5 in San Diego with Joseph Kinsey and Petitioner as
 8 passengers. (Lodgment No. 2(g), Rep.'s Tr. vol. 9, 2598-600, May
 9 19, 1992; Lodgment No. 2(h), Rep.'s Tr. vol. 10, 2780, May 20,
 10 1992.) A red Chevrolet Blazer, driven by James Whitney, suddenly
 11 cut in front of Connelly's car, causing Connelly to swerve and pull
 12 off the road. (Lodgment No. 2(g), Rep.'s Tr. vol. 9, 2500-01,
 13 2600-01.) Connelly, Trevino, and Kinsey followed the Blazer when
 14 it exited the freeway. (Id. at 2503, 2603.) They lost sight of
 15 the vehicle at one point, but they caught up and followed it to the
 16 entrance of Greenfield Mobile Home Park, where Whitney lived. (Id.
 17 at 2501, 2603-04.) Kinsey testified that they followed Whitney's
 18 Blazer "to mess with him, I guess, beat him up, or something."
 19 (Id. at 2602-05; Lodgment No. 2(h), Rep.'s Tr. vol. 10, 2780-81.)

20 The group waited outside the trailer park for a few minutes,
 21 then drove inside. (Lodgment No. 2(g), Rep.'s Tr. vol. 9, 2604.)
 22 They found the Blazer parked with no one nearby, so they left.
 23 (Id. at 2604-05.) They drove to San Ysidro, which was
 24 approximately five minutes away, to see their friend Carlos
 25 Gutierrez at work. (Id. at 2605, 2612; Lodgment No. 2(h), Rep.'s
 26 Tr. vol. 10, 2781.)

27 When they arrived, Gutierrez was in the parking lot talking to
 28 Carlos Mallard, a security guard. (Lodgment No. 2(g), Rep.'s Tr.

1 vol. 9, 2523-26, 2612.) Trevino and Connelly got out of the car to
2 speak with Gutierrez. (Id. at 2612-13.) Kinsey did not join the
3 conversation and did not hear what was said. (Lodgment No. 2(g),
4 Rep.'s Tr. vol. 9, 2613-14; Lodgment No. 2(h), Rep.'s Tr. vol. 10,
5 2782.) While in the parking lot, Petitioner asked Gutierrez "what
6 was up with the nine." (Lodgment No. 2(g), Rep.'s Tr. vol. 9,
7 2529.) Mallard walked away because he thought the men were talking
8 about a nine-millimeter handgun and did not want to be involved.
9 (Id. at 2529-30.) He knew that Gutierrez owned a nine-millimeter
10 handgun. (Id. at 2530-31.) Kinsey, who never joined the other men
11 in the parking lot, saw Trevino holding a gun. (Id. at 2614-15.)
12 After ten to fifteen minutes, Kinsey and Connelly left the parking
13 lot in Connelly's car, and Trevino left as a passenger in
14 Gutierrez's car. (Id. at 2616; Lodgment No. 2(h), Rep.'s Tr. vol.
15 10, 2784.)

16 The two cars drove to Greenfield Mobile Home Park and stopped
17 just outside the entrance gate. (Lodgment No. 2(g), Rep.'s Tr.
18 vol. 9, 2617.) All four men got in Gutierrez's car and drove into
19 the mobile home park together. (Id.) Once they located the red
20 Chevrolet Blazer, the group left the mobile home park to switch
21 cars, because Gutierrez "didn't want no trouble in his car." (Id.
22 at 2618.) The four men got in Connelly's car; Connelly was
23 driving; Trevino was in the front passenger seat; and Gutierrez and
24 Kinsey were in the back seats. (Id. at 2619.) While they drove
25 back into the mobile home park, Trevino stated that he would shoot
26 the Blazer if no one was around. (Lodgment No. 2(h), Rep.'s Tr.
27 vol. 10, 2829, 2836.)
28

1 As they approached the red Blazer, Connelly turned the car's
2 headlights off. (Lodgment No. 2(g), Rep.'s Tr. vol. 9, 2619-20.)
3 Trevino took out the handgun and cocked it, but the others told him
4 not to shoot. (Lodgment No. 2(h), Rep.'s Tr. vol. 10, 2789-91,
5 2832, 2835.) Trevino then shot at the Blazer several times. (Id.
6 at 2791; Lodgment No. 2(g), Rep.'s Tr. vol. 9, 2620.) They
7 accelerated past the Blazer and turned left down the street.
8 (Lodgment No. 2(g), Rep.'s Tr. vol. 9, 2622; Lodgment No. 2(h),
9 Rep.'s Tr. vol. 10, 2791.)

10 Four or five seconds later, Trevino fired two more shots as
11 they drove past another truck. (Lodgment No. 2(g), Rep.'s Tr. vol.
12 9, 2623, 2627; Lodgment No. 2(h), Rep.'s Tr. vol. 10, 2792.)
13 Alfredo Rodriquez, who was standing beside the driver's door of the
14 truck, was shot and killed. (See Lodgment No. 2(f), Rep.'s Tr.
15 vol. 8, 2287-92, May 18, 1992; Lodgment No. 2(g), Rep.'s Tr. vol.
16 9, 2542-43.)

17 After driving out of the mobile home park, Connelly, Kinsey,
18 Gutierrez, and Petitioner all went to Connelly's apartment.
19 (Lodgment No. 2(g), Rep.'s Tr. vol. 9, 2628-29.) Kinsey testified
20 that while there, someone asked Trevino why he shot at the person
21 by the truck, and he stated he thought the person might have "seen
22 his face or the license plate." (Id. at 2630; Lodgment No. 2(h),
23 Rep.'s Tr. vol. 10, 2816-18.) Angela Knecht, who was present in
24 the apartment, overheard Trevino say "his hand was shaking when the
25 gun went off." (Lodgment No. 2(j), Rep.'s Tr. vol. 12, 3398, May
26 22, 1992.)

27 On December 16, 1991, the police found a nine-millimeter
28 handgun and ammunition in Trevino's bedroom. (Lodgment No. 2(f),

1 Rep.'s Tr. vol. 8, 2316-17.) Casings from the crime scene matched
2 casings fired from the gun. (Lodgment No. 2(i), Rep.'s Tr. vol.
3 11, 3060, 3062, 3065-66, May 21, 1992.)

4 On January 1, 1992, Kinsey was interviewed by Detective
5 Swiskowski about the conversations at Connelly's apartment.
6 (Lodgment No. 2(h), Rep.'s Tr. vol. 10, 2816-17.) He told the
7 detective that he thought Trevino might have shot the guy. (Id. at
8 2817.) Kinsey described the conversation: "They were mostly
9 talking. Oh, I wonder if they got the license plate or this and
10 that, you know. Nobody, you know, no one said nothing about the
11 guy [the victim of the shooting]." (Id. at 2818.) Yet, on March
12 17, 1992, Kinsey told the deputy district attorney and his
13 investigator that inside the Connelly apartment Trevino said
14 "something to the effect of he thought the man [the victim] had
15 seen them, their car and possibly even their license[.]" (Id. at
16 2816.)

17 II. PROCEDURAL BACKGROUND

18 On February 21, 1992, the San Diego County District Attorney
19 filed an information charging Trevino, Connelly, Gutierrez, and
20 Kinsey with murder, see Cal. Penal Code § 187(a) (West 1999),
21 conspiracy to shoot at an unoccupied vehicle, see Cal. Penal Code §
22 182(a)(1) (West Supp. 2007), and shooting at an unoccupied vehicle,
23 see Cal. Penal Code § 247(b) (West 1999). It was further alleged
24 that Petitioner used a firearm, and he inflicted great bodily
25 injury in a drive-by shooting, see Cal. Penal Code §§ 12022.5,
26 12022.55, 12022.7 (West Supp. 2007). (Lodgment No. 1, Clerk's Tr.
27 vol. 1, 1-4, Feb. 21, 1992.)
28

1 On March 3, 1992, Trevino's attorney filed a motion to sever
2 Petitioner's trial from that of his codefendants. (Id. at 33-34,
3 Mar. 3, 1992.) A motion to sever was also filed by counsel for
4 codefendant Gutierrez. (Id. at 93-94, Apr. 27, 1992.) Both
5 motions were denied, and the case proceeded jointly against all
6 four defendants. (Lodgment No. 2(c), Rep.'s Tr. vol. 4, 1299, May
7 11, 1992.)

8 Trevino was originally represented by attorney Hank Howlett,
9 but Howlett was relieved and attorney Brent Barnes substituted in
10 as counsel on April 10, 1992. (Lodgment No. 1(a), Clerk's Tr. vol.
11 2, 361, Apr. 10, 1992; Lodgment No. 1(a), Clerk's Tr. vol. 2, 343,
12 July 20, 1992; Lodgment No. 3, Rep.'s Tr. vol. 1, 7, Apr. 10,
13 1992.) Barnes filed a motion to continue the trial date to allow
14 time for him to prepare, but the motion was denied on April 27,
15 1992, the date set for trial to begin. (Lodgment No. 1, Clerk's
16 Tr. vol. 1, 13, Apr. 22, 1992; Lodgment No. 1(a), Clerk's Tr. vol.
17 2, 363, Apr. 27, 1992; Lodgment No. 3(b), Rep.'s Tr. vol. 3, 2,
18 Apr. 27, 1992.) The case was assigned to a trial department and
19 trailed for a week to May 4, 1992. (Lodgment No. 3(b), Rep.'s Tr.
20 vol. 3, 3.) Counsel filed a second motion to continue the trial,
21 which was granted; trial was trailed to May 11, 1992, two weeks
22 after the original trial date of April 27. (Lodgment No. 1,
23 Clerk's Tr. vol. 1, 27-28, May 1, 1992; Lodgment No. 1(a), Clerk's
24 Tr. vol. 2, 367, May 4, 1992.) On May 11, Barnes renewed his
25 request for a further continuance, but the request was denied.
26 (Lodgment No. 2(c), Rep.'s Tr. vol. 4, 1250-51, 1255.)

27 Kinsey pled guilty to one count of shooting at an unoccupied
28 vehicle, and trial proceeded against Trevino, Connelly, and

1 Gutierrez. (See Lodgment No. 2(b), Rep.'s Tr. vol. 3, 1009, May 5,
2 1992; Lodgment No. 11, People v. Trevino, No. D017215, slip op. at
3 14 (Cal. Ct. App. Nov. 15, 1993).) The jury convicted Petitioner
4 of all charges and found each of the special allegations were true.
5 (Lodgment No. 1, Clerk's Tr. vol. 1, 170-74, 185, June 4, 1992;
6 Lodgment No. 1(a), Clerk's Tr. vol. 2, 352-54, July 21, 1992.)

7 On July 7, 1992, Trevino's attorney filed a motion for a new
8 trial or for modification of the verdict. (Lodgment No. 1(a),
9 Clerk's Tr. vol. 2, 309, July 7, 1992.) Petitioner claimed there
10 was "newly-discovered" evidence gained through an investigation of
11 the crime scene that would support the defense's theory that the
12 victim was not shot at "point-blank" range. (Id. at 312.) Trevino
13 filed a supplemental memorandum in support of his motion for new
14 trial arguing that the facts showed the killing was not
15 premeditated, so Trevino's conviction on count one should be
16 reduced from first-degree murder to a lesser offense. (Id. at
17 337.) The motion was denied. (Id. at 423, July 21, 1992; Lodgment
18 No. 2(p), Rep.'s Tr. vol. 18, 28, July 21, 1992.) Petitioner was
19 sentenced to an aggregate term of thirty years to life. (Lodgment
20 No. 1(a), Clerk's Tr. vol. 2, 352-54; Lodgment No. 2(p), Rep.'s Tr.
21 vol. 18, 45.)

22 Trevino filed a notice of appeal on July 28, 1992. (Lodgment
23 No. 1(a), Clerk's Tr. vol. 2, 355, July 28, 1992.) Petitioner
24 argued on appeal that he was deprived of effective assistance of
25 trial counsel by (1) the court's denial of his motion for a
26 reasonable continuance, (2) his attorney's objection to jury
27 instructions regarding accomplice testimony, and (3) his attorney's
28 failure to move to sever the trial based on conflicting defenses.

1 (See Lodgment No. 4, Appellant's Opening Brief at 9, 15, 31, People
2 v. Trevino, No. D017215 (Cal. Ct. App. Nov. 15, 1993).) Trevino
3 also filed a petition for writ of habeas corpus, which the court of
4 appeal considered simultaneously with his appeal. (Lodgment No. 5,
5 Pet. at 1, In re Trevino, No. D018750 (Cal. Ct. App. Nov. 15,
6 1993); Lodgment No. 6, In re Trevino, No. D018750, order at 1 (Cal.
7 Ct. App. Apr. 22, 1993).)

8 The California Court of Appeal affirmed the trial court's
9 judgment and denied Trevino's petition for writ of habeas corpus.
10 (Lodgment No. 11, Trevino, No. D017215, slip op. at 20.)
11 Petitioner filed a petition for rehearing, which was denied.
12 (Lodgment No. 12, Pet. for Reh'g at 1, People v. Trevino, No.
13 D017215 (Cal. Ct. App. Dec. 10, 1993); Lodgment No. 13, People v.
14 Trevino, No. D017215, slip op. at 1 (Cal. Ct. App. Dec. 10, 1993).)
15 Trevino then filed a petition for review in the California Supreme
16 Court; the petition was denied on February 23, 1994. (Lodgment No.
17 14, Pet. for Review at 1, People v. Trevino, No. S036813 (Cal. Feb.
18 23, 1994); Lodgment No. 16, People v. Trevino, No. S036813, slip
19 op. at 1 (Cal. Feb. 23, 1994).) The California Supreme Court also
20 denied a petition for writ of habeas corpus filed by Petitioner at
21 the same time as his petition for review. (Lodgment No. 15, Pet.
22 at 1, In re Trevino, No. S036814 (Cal. Feb. 23, 1994); Lodgment No.
23 17, In re Trevino, No. S036814, docket at 1 (Cal. Feb. 23, 1994).)

24 On December 21, 1994, Petitioner turned to federal court and
25 filed a Petition for Writ of Habeas Corpus [doc. no. 1].
26 Magistrate Judge Roger C. McKee issued a Report and Recommendation
27 Re: Denial for Failure to Exhaust State Remedies [doc. no. 5], and
28 District Judge Irma E. Gonzalez adopted the Report and

1 Recommendation and dismissed the Petition [doc. nos. 6, 7] on
2 September 8, 1995. Over seven months later, on April 18, 1996,
3 Petitioner moved to withdraw the unexhausted claim from the
4 Petition and for reconsideration [doc. no. 8]. The district court
5 did not rule on Trevino's motion because his Petition had been
6 dismissed, stating, "[d]ocuments filed by petitioner since the
7 closing date will be disregarded and no orders will issue in
8 response to future filings." (Order 1, May 15, 1996.)

9 Trevino's First Amended Petition [doc. no. 11], submitted over
10 seven years later, was filed nunc pro tunc to January 29, 2004.
11 The district court construed the Petition as a motion for relief
12 from judgment pursuant to Federal Rule of Civil Procedure 60(b)
13 [doc. no. 12], and it denied the motion on May 21, 2004, finding
14 Trevino had not presented "extraordinary circumstances" that
15 warranted relief from judgment. (Order Den. Pet'r's Mot. Relief
16 From J. 7.) Petitioner then filed a Motion for Reconsideration
17 [doc. no. 23].

18 While the Motion for Reconsideration was pending, Trevino
19 filed a Notice of Appeal of Judge Gonzalez's Order denying relief
20 from judgment [doc. no. 28]. The district court issued a
21 Certificate of Appealability [doc. no. 30] on July 2, 2004. Judge
22 Gonzalez then denied Petitioner's Motion for Reconsideration
23 because the district court lacked jurisdiction in light of
24 Trevino's appeal to the Ninth Circuit. (Order Den. Pet'r's Mot.
25 Reconsideration 2.)

26 The Ninth Circuit Court of Appeals reversed the district
27 court's denial of Trevino's Motion for Reconsideration and remanded
28 the case with instructions to consider the First Amended Petition

1 on the merits [doc. no. 41]. (Trevino v. Prunty, No. 04-56287,
 2 slip op. at 2-3 (9th Cir. Nov. 15, 2005).) On August 18, 2006,
 3 Respondent Michael Evans¹ filed an Answer [doc. no. 49], and he
 4 filed a Notice of Lodgment [doc. no. 50] on August 21, 2006.
 5 Petitioner then filed a Traverse [doc. no. 51] on October 10, 2006.
 6 In a letter brief filed on February 22, 2007, Trevino's attorney
 7 informed the Court of a recent Ninth Circuit decision, Lankford v.
 8 Arave, 468 F.3d 578 (9th Cir. 2006), and asserts that the case is
 9 relevant new authority [doc. no. 52].

10 III. STANDARD OF REVIEW

11 Counsel for Petitioner contends that Trevino is entitled to
 12 habeas relief under the provisions of the Antiterrorism and
 13 Effective Death Penalty Act ("AEDPA"), 28 U.S.C.A. § 2244 (West
 14 2006). (Traverse 3-23.) Respondent, on the other hand, argues
 15 that the presumption of correctness under the pre-AEDPA version of
 16 § 2254(d) applies "to the state court's factual findings." (Answer
 17 2.) He does not contend that AEDPA is applicable.

18 The amended statute, with its more deferential review
 19 requirements, does not apply to federal habeas petitions pending on
 20 April 24, 1996. Woodford v. Garceau, 538 U.S. 202, 204 (2003)
 21 (citing Lindh v. Murphy, 521 U.S. 320, 326 (1997)). Because
 22 Trevino's Petition was filed on December 21, 1994, AEDPA does not
 23 govern this case. See Woodford, 538 U.S. at 204; Phillips v.
 24 Woodford, 267 F.3d 966, 973 (9th Cir. 2001). But see Sanchez v.
 25 Gilmore, 189 F.3d 619, 622-23 (7th Cir. 1999) (applying AEDPA to a

27 ¹ The Court sua sponte substitutes Michael Evans, Warden of
 28 Salinas Valley State Prison, for K.W. Prunty, former Warden. See
 Fed. R. Civ. P. 25(d)(1); Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894
 (9th Cir. 1996).

1 second petition filed after 1996 when an earlier, pre-AEDPA
2 petition was dismissed for failure to exhaust).

3 In Phillips, the petitioner filed his original petition before
4 AEDPA was enacted on April 24, 1996. "Following the district
5 court's dismissal of that petition, we reversed and remanded, and
6 Phillips filed the instant amended petition on July 15, 1996. In
7 these circumstances, we treat Phillips's amended petition -- filed
8 after AEDPA's effective date -- as part of his earlier,
9 erroneously dismissed petition, and apply pre-AEDPA law."
10 Phillips, 267 F.3d at 973. Because the procedural history of
11 Petitioner's case mirrors that in Phillips, pre-AEDPA law applies
12 to Trevino's claims.

13 In 1996, Congress "worked substantial changes to the law of
14 habeas corpus." Moore v. Calderon, 108 F.3d 261, 263 (9th Cir.
15 1997). Before and since the passage of AEDPA, some requirements
16 have remained constant. To present a cognizable federal habeas
17 corpus claim, a state prisoner must allege that his conviction was
18 obtained "in violation of the Constitution or laws or treaties of
19 the United States." See 28 U.S.C.A § 2254(a) (West 2006).
20 Petitioner must allege that the state court violated his federal
21 constitutional rights. See Reed v. Farley, 512 U.S. 339, 347
22 (1994); Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991);
23 Jackson v. Ylst, 921 F.2d 882, 885 (9th Cir. 1990).

24 A federal district court does "not sit as a 'super' state
25 supreme court" with general supervisory authority over the proper
26 application of state law. Smith v. McCotter, 786 F.2d 697, 700
27 (5th Cir. 1986); see also Lewis v. Jeffers, 497 U.S. 764, 780
28 (1990) (holding that federal habeas courts must respect a state

1 court's application of state law); Jackson, 921 F.2d at 885
 2 (concluding that federal courts have no authority to review a
 3 state's application of its law). Federal courts may grant habeas
 4 relief only to correct errors of federal constitutional magnitude.
 5 Oxborrow v. Eikenberry, 877 F.2d 1395, 1400 (9th Cir. 1989)
 6 (stating that federal courts are not concerned with errors of state
 7 law unless they rise to the level of a constitutional violation).
 8 "Under pre-AEDPA law, the state court's findings of fact are
 9 'entitled to a presumption of correctness unless they are 'not
 10 fairly supported by the record.'" Clark v. Brown, 450 F.3d 898,
 11 904 (9th Cir.), cert. denied, ___ U.S. ___, 127 S. Ct. 555 (2006)
 12 (quoting Silva v. Woodford, 279 F.3d 825, 835 (9th Cir. 2002)).
 13 Questions of law are reviewed de novo. Clark, id. Mixed questions
 14 of law and fact are also subject to de novo review. Correll v.
 15 Ryan, 465 F.3d 1006, 1009 (9th Cir. 2006) (reviewing ineffective
 16 assistance of counsel claim); Clark, 450 F.3d at 904 (stating that
 17 harmless error is reviewed de novo).

18 IV. DISCUSSION

19 Petitioner claims he was denied effective assistance of
 20 counsel because: (1) The trial court denied his counsel's requests
 21 for a continuance, leaving his attorney with inadequate time to
 22 prepare for trial; (2) his attorney failed to seek a severance of
 23 his trial from that of his codefendants due to inconsistent
 24 defenses; and (3) his attorney objected to giving a jury
 25 instruction regarding accomplice testimony. (See Am. Pet. 4-12;
 26 Traverse 3-23.)

27 In deciding a habeas petition, this Court reviews the "last
 28 reasoned" state court decision. Ylst v. Nunnemaker, 501 U.S. 797,

1 803 (1991); Medina v. Hornung, 386 F.3d 872, 877 (9th Cir. 2004).
 2 The California Supreme Court summarily denied Trevino's petition
 3 for review. (Lodgment No. 16, Trevino, No. S036813, slip op. at
 4 1.) Therefore, this Court "looks through" that dismissal to the
 5 California Court of Appeal's decision on Petitioner's direct
 6 appeal. Medina, 386 F.3d at 877.

7 **A. The Trial Court's Denial of Counsel's Motions for Continuance**
 8 **Did Not Deny Trevino Effective Assistance of Counsel.**

9 Petitioner's first habeas claim for relief is that he did not
 10 receive effective assistance of counsel because the trial court
 11 denied his newly-retained counsel's motions for a continuance to
 12 prepare for trial. (See Am. Pet. 1-8; Traverse 3-9.) Trevino
 13 alleges he was deprived of his "right to competent counsel" in
 14 violation of the Sixth and Fourteenth Amendments and the Supreme
 15 Court's holding in Strickland v. Washington, 466 U.S. 668 (1984).
 16 (Traverse 3.)

17 The California Court of Appeal did not analyze this claim
 18 under Strickland; the case law cited and arguments made to the
 19 court indicated that Trevino was asserting a due process claim.
 20 (Compare Lodgment No. 11, Trevino, No. D017215, slip op. at 5-6,
 21 with Lodgment No. 4, Appellant's Opening Brief at 9-14, People v.
 22 Trevino, No. D017215.) The court examined whether the lower court
 23 abused its discretion in denying Trevino's motions for a
 24 continuance: "A review of the procedural record convinces us the
 25 trial court did not abuse its discretion in denying Trevino's
 26 counsel's requests for continuances and hence Trevino was not
 27 denied due process of law." (Lodgment No. 11, Trevino, No.
 28 D017215, slip op. at 7.) The appellate court did not address the

1 ineffective assistance of counsel aspect of this ground for relief.
2 (See id. at 6 n.4.)

3 Here, Trevino is raising more than a due process violation; he
4 appears to be arguing a combined due process and ineffective
5 assistance of counsel claim. (See Am. Pet. 4-8; Traverse 3-9.)
6 Analogous facts and claims have been asserted in a variety of ways.
7 For example, in Castillo v. Matesanz, 348 F.3d 1, 4 (1st Cir.
8 2003), Castillo asserted that "the state court's rejection of his
9 two new trial claims -- a due process violation in denying [a]
10 continuance and ineffective assistance of counsel -- warranted
11 habeas relief." Castillo argued that controlling case law was
12 Ungar v. Sarafite, 376 U.S. 575 (1964), the same case cited by
13 Trevino. Id. at 9. Ungar requires the reviewing court to examine
14 the circumstances presented at the time of the request for a
15 continuance. Id. It must determine whether a denial of a
16 continuance was "so arbitrary as to violate due process." Id.
17 (quoting Ungar, 376 U.S. at 589.) After deciding that a due
18 process violation had not occurred, the court reviewed Castillo's
19 separate claim that he received ineffective assistance of counsel
20 in violation of Strickland. Id. at 10-16.

21 In United States v. Stewart, 256 F.3d 231, 244 (4th Cir.
22 2001), one of the appellants made an argument similar to Trevino's:
23 "[Appellant] Livingston next contends that the district court
24 violated his Sixth Amendment right to effective assistance of
25 counsel by denying Livingston's motion for a continuance because
26 the denial forced his counsel to proceed to trial without adequate
27 preparation time." The Fourth Circuit required Livingston to prove
28 "first that the district court abused its discretion in denying the

1 continuance motion and second that the denial 'specifically
2 prejudiced' his case." Id.

3 Whether viewed as a due process claim or the first half of a
4 combined due process and ineffective assistance of counsel claim,
5 Trevino must show, at a minimum, that the trial court abused its
6 discretion in denying a continuance. See Morris v. Slappy, 461
7 U.S. 1, 11-12 (1983); Williams v. Stewart, 441 F.3d 1030, 1056 (9th
8 Cir.), cert. denied, ___ U.S. ___ 127 S. Ct. 510 (2006).

9 **1. Continuance of the Trial**

10 Although an attorney must be able to conduct a reasonable
11 investigation into his client's case, "[n]ot every restriction on
12 counsel's time or opportunity to investigate or consult with his
13 client or otherwise to prepare for trial violates a defendant's
14 Sixth Amendment right to counsel." Morris v. Slappy, 461 U.S. at
15 11 (citing Chambers v. Maroney, 399 U.S. 42, 53-54 (1970)).
16 Defendants do not have an absolute right to a continuance to allow
17 counsel more time to prepare. United States v. Poston, 902 F.2d
18 90, 96 (D.C. Cir. 1990). "The denial of a continuance contravenes
19 a defendant's Sixth Amendment right to counsel only when there has
20 been 'an unreasoning and arbitrary insistence upon expeditiousness
21 in the face of a justifiable request for delay.'" United States v.
22 Hedgepeth, 418 F.3d 411, 423 (4th Cir. 2005) (quoting Morris, 461
23 U.S. at 11-12).

24 Trevino complains that the trial court failed to delay the
25 trial date to give his attorney adequate time to prepare. (Am.
26 Pet. 4-8; Traverse 3-9.) In support of this claim, Petitioner
27 refers to requests made for a continuance on April 10, 27, 30, May
28 4 and 11. (Am. Pet. 7; Traverse 4-6.) Trevino argues that the

1 evidence produced in support of his motion for a new trial and
2 state habeas petition establishes that the state trial and
3 appellate courts' findings of fact are not entitled to a
4 presumption of correctness. (Traverse 7-8.) This post-trial
5 evidence, however, does not compel habeas relief.

6 A reviewing court decides whether a denial of a continuance is
7 arbitrary and violates due process based upon "the reasons
8 presented to the trial judge at the time the request is denied."
9 Ungar, 376 U.S. at 589 (emphasis added). Consequently, evidence
10 presented in a post-trial motion or state habeas petition is not
11 relevant to Petitioner's claim.

12 The Court may consider "whether previous continuances have
13 been granted; whether the parties, the court, or counsel would be
14 inconvenienced; whether there are legitimate reasons for the delay;
15 whether the denial would prejudice the defendant; and whether the
16 delay is the defendant's fault." Williams, 441 F.3d at 1056. The
17 California Court of Appeal examined "all relevant circumstances and
18 specifically the reasons presented to the trial court at the time
19 the request [for a continuance] was denied." (Lodgment No. 11,
20 People v. Trevino, No. D017215, slip op. at 6-7.) Trevino made
21 multiple requests to continue his trial. (Lodgment No. 11, People
22 v. Trevino, D017215, slip op. at 5-9.) On April 10, 1992,
23 Petitioner's new counsel requested a thirty-day continuance. (Id.
24 at 7.) The reasons are part of the record. (Lodgment No. 3,
25 Rep.'s Tr. vol. 1, 3-7.) New counsel stated that he had been
26 looking at the case for about three weeks and was "somewhat
27 familiar" with it and some of the issues. (Id. at 3.) He also
28 reviewed the videotapes of the interrogations from 6:00 p.m. to

1 3:00 a.m. one night. (Id. at 6.) "[T]he trial court advised
 2 Barnes he would let him in the case if he was ready to proceed on
 3 April 27. The offer was accepted and the court confirmed the April
 4 27 date." (Lodgment No. 11, People v. Trevino, D017215, slip op.
 5 at 7.) The trial, however, did not begin until May 11, which was
 6 thirty days from the date of the original request for a
 7 continuance. (Id.)

8 The next motion to continue the trial was argued on April 27,
 9 the day set for trial. (Lodgment No. 3(b), Rep.'s Tr. vol. 3, 1-3;
 10 Lodgment No. 1, Clerk's Tr. 13.) The motion, filed on April 22,
 11 1992, stated that "defense experts and investigators will not have
 12 completed their tasks, that discovery materials (specifically,
 13 photo negatives) either have not been received or were received too
 14 late for trial and witness preparation" (Lodgment No. 1,
 15 Clerk's Tr. 13.) In addition, on April 27, counsel announced that
 16 he was "not ready" and argued for more time. (Lodgment No. 3(b),
 17 Rep.'s Tr. vol. 3, 1.)

18 The rationale for the continuance is the continuing
 19 availability of some discovery; and that is some
 20 photographs that we've asked for, the -- plus a more
 21 recent order permitting investigations and a reenactment.
 22 And I have investigators working on the matter. I have
 an expert familiarizing himself with the matter and
 working on it. And for all of these reasons, Mr. Trevino
 needs a continuance in order to get effective
 representation in trial.

23 (Id.) Barnes explained that he had "a recently appointed expert
 24 who was appointed finally by order of this court." (Id. at 2.)
 25 The court disagreed: "No, sir, that expert was involved before."
 26 (Id.) In an earlier declaration, counsel stated that on April 13,
 27 1992, he "called the office of Criminalist Parker Bell, with whom
 28 Mr. Howlett [prior counsel] had made some arrangements for a re-

1 enactment." (Lodgment No. 1, Clerk's Tr. vol. 1, 12.) Although
2 the court nominally denied the April 27 motion, (Lodgement 3(b),
3 Rep.'s Tr. vol. 3, 2), the judge assigned the matter to another
4 trial department and stated, "That will give you approximately a
5 week and a half to do whatever you have to do, counsel." (Id. at
6 3.)

7 Another request for a continuance was made on May 4, 2002.
8 (Lodgment No. 3, Rep.'s Tr. vol. 1, 8.) Judge Murphy became
9 available to try the case before the scheduled May 11 trial date;
10 Trevino's counsel acknowledged that "we would have started trial on
11 the 11th [but stated that he] would like more time." (Id. at 9.)
12 Barnes explained, "[I]t is just that my time was very tightly
13 allocated, and then I got side tracked on several other things,
14 unfortunately, including that which was the Rodney King verdict in
15 the Los Angeles case. That emotionally kind of messed me up."
16 (Id.) The court then agreed that the case could be trailed to May
17 11th. (Id.)

18 On May 11, Trevino's counsel made his last motion to continue
19 the trial. (Lodgment No. 2(c), Rep's Tr. vol. 4, 1250-52.) Barnes
20 recounted the history of his previous requests and that he did not
21 receive the anticipated help of volunteer attorneys. (Id.) He
22 concluded: "I do not feel as comfortable as I would like to be in
23 trying this case because I'm not prepared as well as I would like
24 to be." (Id. at 1252.) The trial court denied the motion, and
25 trial began the next day, May 12. (Id. at 1255, 1402.)

26 Trevino's claim requires that the Court examine each
27 sequential request for a continuance and the basis for each
28 request. The Court also examines Petitioner's collective requests

1 for a continuance and the additional preparation time that counsel
2 was given.

3 The superior court accommodated Trevino's request for
4 additional time, balanced the conflicting demands on the
5 prosecution and codefendants, and considered the stated reasons for
6 continuances. In this context, the actual and ostensible denials
7 of Trevino's motions to continue the trial date were not abuses of
8 discretion, and the state court's determination of the facts are
9 fairly supported by the record in light of the evidence presented.
10 Clark, 450 F.3d at 904.

11 If Trevino's first ground for relief is a due process claim,
12 the road to habeas relief ends here. Because he may be asserting a
13 combined due process and ineffective assistance of counsel claim,
14 the Court will turn to the ineffective assistance aspect of the
15 claim.

16 **2. Reasonableness of Counsel's Performance**

17 In spite of Petitioner's other complaints about trial
18 counsel's actual ineffectiveness, the first ground for habeas
19 relief asserts that with more preparation time his attorney "would
20 have presented demonstrative evidence showing how dark the trailer
21 park was on the night of the shooting," and he would have
22 "investigators gather evidence of how dark the trailer park was on
23 a cloudless night" (Traverse 6.)

24 Ineffective assistance of counsel can arise in two ways: The
25 government may violate a defendant's right to effective assistance
26 by interfering with counsel's ability "to make independent
27 decisions about how to conduct the defense[,]" or an attorney may
28 simply fail to render adequate representation. Strickland v.

1 Washington, 466 U.S. 668, 686 (1984) (citations omitted). One
2 group of claims refers to government interference; the other refers
3 to actual ineffectiveness. Id. Although Trevino's second and
4 third claims for habeas relief allege "actual ineffectiveness" of
5 attorney Barnes, his first claim asserts that the trial court's
6 decisions to deny his counsel's requests for continuances
7 interfered with the attorney's ability to properly investigate and
8 present the defense. (See Am. Pet. 4-8, 11; Traverse 6-7, 9-10,
9 16-18.)

10 The Sixth Amendment guarantees criminal defendants effective
11 assistance of counsel. Dows v. Wood, 211 F.3d 480, 484 (9th Cir.
12 2000); see McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)
13 (stating "the right to counsel is the right to the effective
14 assistance of counsel"). In Strickland v. Washington, 466 U.S.
15 668, the Supreme Court set the federal standard for resolving
16 ineffective assistance of counsel claims. These claims have two
17 prongs that must both be satisfied. First, counsel's performance
18 must have been deficient in that "counsel's representation fell
19 below an objective standard of reasonableness." Id. at 687-88.
20 Second, "the defendant must show that the deficient performance
21 prejudiced the defense"; in other words, "there is a reasonable
22 probability that, but for counsel's unprofessional errors, the
23 result of the proceeding would have been different. A reasonable
24 probability is a probability sufficient to undermine confidence in
25 the outcome." Id. at 687, 694.

26 The Court need not address both prongs if the petitioner
27 alleging ineffective assistance makes an insufficient showing on
28 one. Id. at 697. "If it is easier to dispose of an

1 ineffectiveness claim on the ground of lack of sufficient
2 prejudice, which we expect will often be so, that course should be
3 followed." Id.

4 "[B]oth the performance and prejudice components of the
5 ineffectiveness inquiry are mixed questions of law and fact."
6 Strickland, 466 U.S. at 698. The presumption of correctness
7 applies to "state court findings of fact made in the course of
8 resolving claims of ineffective assistance of counsel"
9 Lambert v. Blodgett, 393 F.3d 943, 977 (9th Cir. 2004). But the
10 state court's conclusion that counsel rendered effective assistance
11 or the application of federal law to state court factual findings
12 is reviewed de novo. Correll v. Ryan, 465 F.3d at 1009.

13 "A lawyer generally is presumed competent, and it is the
14 burden of the accused to overcome this presumption." Dows, 211
15 F.3d at 485 (citing United States v. Cronic, 466 U.S. 648, 658
16 (1984)); see also Strickland, 466 U.S. at 689. Courts will presume
17 that a defendant has suffered prejudice "when counsel was either
18 totally absent or prevented from assisting the accused during a
19 critical stage of the proceedings, or if counsel entirely failed to
20 subject the prosecution's case to meaningful adversarial testing."
21 Hays v. Alabama, 85 F.3d 1492, 1496-97 (11th Cir. 1996) (citing
22 Cronic, 466 U.S. at 662); see also Dows, 211 F.3d at 485.
23 Otherwise, "the defendant must point to specific errors made by
24 defense counsel that undermine confidence in the outcome of the
25 trial." United States v. LaRouche, 896 F.2d 815, 823 (6th Cir.
26 2003); see Strickland, 466 U.S. at 693-96; Cronic, 466 U.S. at 659
27 n.26 (citations omitted).

28

1 Attorney Barnes's motion for continuance, filed on April 22,
2 1992, claimed that he needed additional time to receive and review
3 discovery and for experts and investigators to complete their
4 tasks. (Lodgment No. 1, Clerk's Tr. vol. 1, 13.) The case was
5 assigned to a trial department, but it was trailed to May 4, 1992.
6 (Lodgment No. 3(b), Rep.'s Tr. vol. 3, 3.) Trial was again trailed
7 to May 11, 1992. (Lodgment No. 3, Rep.'s Tr. vol. 1, 9.)

8 On May 11, Barnes made a request for a further continuance,
9 claiming he did not feel as prepared as he would like to be, even
10 though he had been devoting all his time to trial preparation.
11 (Lodgment No. 2(c), Rep.'s Tr. vol. 4, 1251-52.) At that time he
12 indicated his investigator did not start work on the case until
13 April 23. (Id. at 1254.) The judge denied the motion. (Id. at
14 1255.)

15 "Where counsel has no acquaintance with the facts of the case
16 and no opportunity to plan a defense, the result is that the
17 defendant is effectively denied his constitutional right to
18 assistance of counsel." Chambers v. Maroney, 399 U.S. at 59
19 (quoting Avery, 308 U.S. at 446). That is not the case here.
20 Trevino went to trial one month after Barnes substituted in as
21 counsel; Barnes had already been looking at the case for three
22 weeks and was familiar with it and some of the issues. (See
23 Lodgment No. 3, Rep.'s Tr. vol. 1, 3, 6.) When Barnes replaced
24 Howlett on April 10, 1992, the court warned him that trial was set
25 for April 27, and he must be ready to go to trial on that date.
26 (Id. at 6-7.) Counsel agreed. (Id. at 7.) Trial did not begin
27 until May 11, giving Barnes an additional two weeks beyond the
28 April 27 trial date to prepare. Barnes devoted a significant

1 amount of time to preparing for trial: "Once I took on this case,
2 I ceased all meaningful work on other matters at my office."
3 (Lodgment No. 5, Barnes Decl. at 3, Apr. 6, 1993.) Barnes also had
4 the assistance of two volunteer attorneys who worked long hours to
5 help Barnes prepare. (Lodgment No. 2(a), Rep.'s Tr. vol. 2, 288,
6 Apr. 30, 1992.)

7 The superior court did not abuse its discretion in denying
8 Barnes's requests for further continuances. Furthermore, its
9 rulings do not constitute an unconstitutional interference with
10 counsel's ability to make independent decisions about conducting
11 Trevino's defense. In United States v. Cronic, 466 U.S. at 658-60,
12 the Court stated that there are "circumstances that are so likely
13 to prejudice the accused" that prejudice is presumed. "But every
14 refusal to postpone a criminal trial will not give rise to such a
15 presumption." Id. at 661. "Cronics presumption of prejudice
16 applies to only a very narrow spectrum of cases where the
17 circumstances leading to counsel's ineffectiveness are so egregious
18 that the defendant was in effect denied any meaningful assistance
19 at all." Chadwick v. Green, 740 F.2d 897, 901 (11th Cir. 1984).

20 The Court will not presume Petitioner was prejudiced simply
21 because his counsel had a limited amount of time to prepare for
22 trial. See, e.g., Cronic, 466 U.S. at 665 (twenty-five days to
23 prepare for trial was not presumptively prejudicial); Conklin v.
24 Schofield, 366 F.3d 1191, 1202 (11th Cir. 2004) (thirty-seven
25 days); Glover v. Miro, 262 F.3d 278 (4th Cir. 2001) (two days).

26 Even if the state court abused its discretion in denying the
27 continuance, this is not a case where it hampered defense counsel's
28 efforts to the extent that prejudice may be presumed. See United

1 States v. Stewart, 256 F.3d at 244 (stating that to prove
2 ineffective assistance based on wrongful denial of a continuance,
3 the defendant must show the court abused its discretion and the
4 defendant suffered specific prejudice).

5 **3. Prejudice**

6 Whether Trevino is complaining of government interference with
7 his right to counsel or the actual ineffectiveness of trial
8 counsel, Petitioner must be prejudiced to obtain habeas relief.
9 Strickland, 466 U.S. at 686. Trevino must show a reasonable
10 probability that the outcome would have been different if the trial
11 court had granted a continuance. Strickland, 466 U.S. at 695.
12 "When a defendant challenges a conviction, the question is whether
13 there is a reasonable probability that, absent the errors, the
14 factfinder would have had a reasonable doubt respecting guilt."
15 Id. at 695.

16 "To determine whether counsel's errors prejudiced the outcome
17 of the trial, we must compare the evidence that actually was
18 presented to the jury with that which could have been presented had
19 counsel acted appropriately." Daniels v. Woodford, 428 F.3d 1181,
20 1201 (9th Cir. 2005) (citing Bonin v. Calderon, 59 F.3d 815, 834
21 (9th Cir. 1995)).

22 Trevino claims that with more time to prepare, his attorney
23 would have investigated and presented evidence of the lighting on
24 the night of the shooting. (Am. Pet. 8.) This evidence would have
25 been used "to impeach the argument that petitioner saw the victim
26 before shooting." (Id.) Trevino asserts that because it was dark
27 that night, "it would have been extremely difficult if not
28 impossible for petitioner to see the decedent before the decedent

1 was shot[,]” so the killing could not have been premeditated.

2 (Traverse 9.)

3 Barnes stated that both he and an investigator went to the
4 scene of the December 2, 1991, shooting to examine the lighting.
5 (Lodgment No. 5, Barnes Decl. at 4.) But the investigation
6 occurred several months later, so Barnes could not obtain a reading
7 of the light levels that would accurately depict the lighting on
8 the night of the shooting. (Lodgment No. 1(a), Clerk’s Tr. vol. 2,
9 350.) As counsel stated in his new trial motion, “If there had
10 been sufficient time, or if there had been a clear night, I would
11 have had light level evidence.” (Id.) Nevertheless, Barnes was
12 able to communicate his theory of the defense to the jury,
13 including that it was dark, and Trevino may not have been able to
14 see what he was shooting.

15 Under cross-examination, Joseph Kinsey, who was in the vehicle
16 with Trevino, agreed that the trailer park was a “very dark place”
17 that night. (Lodgment No. 2(h), vol. 10, 2820.) Kinsey admitted
18 that they “were looking around in the dark trying to find the
19 Blazer” (Id.) In addition, private investigator Bill
20 Smith testified about the layout of the mobile home park where the
21 shooting occurred. (Lodgment No. 2(j), Rep.’s Tr. vol. 12, 3402-
22 05.) He described a lamppost near mobile home unit seventy-nine
23 and stated that it only illuminated approximately thirty-five to
24 thirty-nine feet. (Id. at 3407-08.)

25 In his closing, Trevino’s counsel argued that his client
26 couldn’t see the victim. “He [the victim] might have been shot
27 from out of the darkness. I don’t know.” (Lodgment No. 2(m),
28 Rep.’s Tr. vol. 15, 4038, May 28, 1992.)

1 Those last two bullets could support, in reason, the
2 second degree. It could, depends on whether or not he
3 sees the guy behind the truck. If he doesn't see him, he
can't be intending to shoot him; but if he saw him
popping out it could support a second degree.

4 But my other suggestion that this may have come out
5 of the dark, and they may have been passing a dying man,
that's involuntary manslaughter.

6 (Id. at 4048-49.) There is no indication that with additional time
7 Barnes could have gathered more evidence that would have changed
8 the outcome.

9 "Some errors will have a pervasive effect on the inferences to
10 be drawn from the evidence, . . . and some will have an isolated,
11 trivial effect." Strickland, 466 U.S. at 695-96. "[I]n cases with
12 overwhelming evidence of guilt, it is especially difficult to show
13 prejudice from a claimed error on the part of trial counsel."
14 Bonin, 59 F.3d at 836 (quoting United States v. Coleman, 707 F.2d
15 374, 378 (9th Cir. 1983)).

16 The prosecutor had strong evidence of guilt. Trevino's
17 attorney did not dispute that Petitioner was the shooter; the
18 question was whether his actions were premeditated murder or some
19 lesser offense. (See Lodgment No. 2(m), Rep.'s Tr. vol. 15, 4001-
20 03.) Kinsey testified that he saw the victim standing next to the
21 truck before Trevino shot him, which contradicts Barnes's theory
22 that it was too dark to see. (Lodgment No. 2(g), Rep.'s Tr. vol.
23 9, 2624-25.) Gutierrez's statement was that "he saw an unknown man
24 get shot." (Lodgment No. 1(a), Clerk's Tr. vol. 2, 284, May 22,
25 1992.) Connelly's statement, likewise, indicated that the victim
26 was visible, although it was dark.

27 I drove my vehicle slowly through the park. I was
28 told to and turned my headlights off as I got closer to
the Blazer and saw the Blazer get shot. After I turned
the corner, I saw a man standing by the truck. Like he

1 was either talking to someone in the truck, or I'm not
 2 too sure, because, like, I turned, it was dark, and all I
 3 could see was like a black figure, someone like a shadow.
 4 I didn't know if he was shot or not, I didn't know
 exactly what happened cause [I] couldn't see, I was just
 driving. My headlights were still off when the man got
 shot.

5 (Id. at 287.) Kinsey testified that Petitioner said he shot
 6 Rodriguez because he thought the victim might have seen his face or
 7 the car's license plate. (Lodgment No. 2(g), Rep.'s Tr. vol. 9,
 8 2630.) Although these statements all came from coperpetrators, the
 9 jury found them credible and agreed with the prosecution that
 10 Trevino premeditated the killing.

11 Petitioner has failed to establish a probability that the
 12 outcome would have been different if his attorney was given more
 13 time to prepare. Trevino argues that counsel's error had a
 14 "substantial and injurious effect on the verdict[,] " citing Brecht
 15 v. Abrahamson, 507 U.S. at 627. (Traverse 8.) This ineffective
 16 assistance claim, however, does not require a separate discussion
 17 under Brecht. "[B]ecause the prejudice analysis in Strickland v.
 18 Washington, . . . derived from the Agurs materiality standard,
 19 federal courts do not conduct a separate Brecht analysis in
 20 ineffective assistance of counsel claims." Hayes v. Brown, 399
 21 F.3d 972, 985 (9th Cir. 2005) (en banc). Thus, Trevino's first
 22 claim for habeas relief should be **DENIED**.

23 **B. Trial Counsel's Failure to Seek a Severance Based on**
 24 **Inconsistent Defenses Was Not Ineffective Assistance of**
 25 **Counsel.**

26 In his second claim, Trevino argues that his attorney's
 27 failure to seek a severance of Trevino's trial from that of his
 28 codefendants' denied him effective assistance of counsel. (Am.

1 Pet. 8-11; Traverse 16-23.) He contends Barnes should have
2 requested a severance when it "became apparent that the
3 codefendants' strategy would be to focus on petitioner's guilt as
4 the shooter and to argue that he had fired the gun while they
5 protested the use of any violence." (Traverse 17.)

6 Petitioner was tried jointly with codefendants Connelly and
7 Gutierrez. Kinsey, who would have been a codefendant, pled guilty
8 to one count of shooting at an unoccupied vehicle in exchange for
9 cooperating with the prosecution and testifying against the other
10 defendants. (Lodgment No. 2(a), Rep.'s Tr. vol. 2, 284.)

11 On March 3, 1992, Trevino's prior attorney, Hank Howlett,
12 moved to sever the case based on the possibility that incriminating
13 out-of-court statements made by the codefendants would be admitted.
14 (Lodgment No. 1, Clerk's Tr. vol. 1, 33.) After Barnes replaced
15 Howlett as counsel on April 10, 1992, he joined in Howlett's motion
16 for severance. (Lodgment No. 2(c), Rep.'s Tr. vol. 4, 1296-97.)
17 Barnes also joined in a motion for separate trials filed by
18 Gutierrez's counsel. (Id.; see Lodgment No. 1, Clerk's Tr. vol. 1,
19 93, Apr. 27, 1992.) The trial court denied the motions, instead
20 deciding to redact the codefendants' statements before admitting
21 them at trial. (Lodgment No. 2(c), Rep.'s Tr. vol. 4, 1299;
22 Lodgment No. 2(e), Rep.'s Tr. vol. 7, 2039, May 15, 1992.) Barnes
23 did not request a severance at any time after this.

24 In a declaration submitted with Trevino's state habeas
25 petition, Barnes explained:

26 At the time of in-limine motions (in preparation for
27 which I had done no research), I had no concept or grasp
28 of the conflict between an appropriate defense of my
client and that of his co-defendants. I frankly never
thought of moving for a severance based upon inconsistent
theories of defense.

(Lodgment No. 5, Pet., Decl. of Barnes 5, In re Trevino, No. D018750.) Pointing to this statement, Trevino now argues that his counsel's failure to seek a severance based upon inconsistent defenses among the codefendants was not "informed by adequate and competent investigation of the law and facts." (Traverse 19.) Barnes acknowledges that he did not realize until late in the presentation of evidence that Trevino's defense may be inconsistent with that of his codefendants. (Lodgment No. 5, Barnes Decl. at 5.) Looking back, Barnes states he likely would have called his client to the stand to testify that he shot without seeing the victim and to attack Kinsey's credibility. (Id. at 5-6.)

The California Court of Appeal rejected Petitioner's claim of ineffective assistance under Strickland for failure to seek severance on the ground of inconsistent defenses, finding that Barnes had a "valid tactical basis" for not moving to sever. (Lodgment No. 11, Trevino, No. D017215, slip op. at 18-19.)

1. Reasonableness of Counsel's Performance

"A disagreement with counsel's tactical decisions does not provide the basis for declaring that the representation was constitutionally deficient." Raley v. Ylst, 470 F.3d 792, 799 (9th Cir. 2006) (citing United States v. Mayo, 646 F.2d 369, 375 (9th Cir. 1981)). Indeed, informed strategic choices are "virtually unchallengeable." Strickland, 466 U.S. at 690. "Whether to seek severance of defendants . . . is within the wide range of tactical decisions entrusted to trial counsel." Johnson v. McGrath, No. CV 03-8844-DDP, 2006 WL 2331006, at *15 n.18 (C.D. Cal. Aug. 2, 2006) (citing Ryan v. Clarke, 281 F. Supp. 2d 1008, 1082 (D. Neb. 2003)). "It does not matter whether trial counsel made the best choice

1 possible. The question is 'whether counsel's conduct so undermined
2 the proper functioning of the adversarial process that the trial
3 cannot be relied on as having produced a just result.'" Sullivan
4 v. Schriro, No. CIV-04-1517-PHX-DGC(GEE), 2005 U.S. Dist. LEXIS
5 26339, at *36 (D. Ariz. Aug. 15, 2005) (quoting Strickland, 466
6 U.S. at 686).

7 Trevino asserts that Barnes rendered ineffective assistance
8 because he "never even considered filing a motion to sever based on
9 inconsistent defenses." (Am. Pet. 10.) But Barnes did join in
10 Trevino's prior counsel's motion to sever based on the prejudicial
11 effect of admitting the codefendants' statements into evidence.
12 (Lodgment No. 2(c), Rep.'s Tr. vol. 4, 1296-97; Lodgment No. 1,
13 Clerk's Tr. vol. 1, 3-5.) Counsel argued that if tried jointly,
14 statements by the codefendants implicating Trevino would be
15 admitted. (Lodgment No. 2(c), Rep.'s Tr. vol. 4, 1296-97.) He
16 asserted that the jury would link redacted statements of the two
17 codefendants and other trial testimony to the detriment of Trevino.
18 (Id.) Nevertheless, the court denied the motion to sever. (Id. at
19 1299; Lodgment No. 2(e), Rep.'s Tr. vol. 7, 2039, May 15, 1992.)

20 The trial court believed that the admission of edited
21 statements protected Trevino's rights under Bruton v. United
22 States, 391 U.S. 123 (1968), and Richardson v. Marsh, 481 U.S. 200
23 (1987). (Id. at 1290-96.) According to Trevino, "acceptance of
24 the co-defendants' defense precluded petitioner from being
25 acquitted of first-degree murder." (Traverse 21-22.) Petitioner
26 argues that "severance of defendants is required when 'there is a
27 serious risk that a joint trial would compromise a specific trial
28 right of one of the defendants, or prevent the jury from making a

1 reliable judgment about guilt or innocence.'" (Id. at 20 quoting
2 Zafiro v. United States, 506 U.S. at 539.)

3 This argument is not persuasive. First, Zafiro involved the
4 interpretation of the Federal Rules of Criminal Procedure, not the
5 United States Constitution. Phillips v. Million, 374 F.3d 395, 398
6 (6th Cir. 2004); Hood v. Helling, 141 F.3d 892, 898 (8th Cir.
7 1998). Second, even "[m]utually antagonistic defenses are not
8 prejudicial per se." Zafiro, 506 U.S. at 538. Trevino and the
9 codefendants were not asserting truly irreconcilable defenses.
10 Trevino did not dispute that he pulled the trigger. Instead, he
11 contends, "Petitioner would not have been convicted of first-degree
12 murder and would have had a chance of being convicted of no more
13 than manslaughter based on his shooting at the unoccupied Blazer."
14 (Traverse 18.) To establish prejudice from a joint trial, "the
15 defenses truly must be mutually exclusive, such that the jury could
16 not believe the core of one defense without discounting entirely
17 the core of the other." United States v. Dirden, 38 F.3d 1131,
18 1141 (10th Cir. 1994). Finally, limiting instructions or some
19 other measure will often cure any risk of prejudice. Zafiro, 506
20 U.S. at 539.

21 The California Court of Appeal observed that "the motion for
22 severance due to conflicting defenses revolves around Barnes's
23 tactical decision to join the codefendants in objecting to the jury
24 being advised of Kinsey's status as an accomplice who had plea
25 bargained with the prosecution." (Lodgment No. 11, People v.
26 Trevino, D017215, slip op. at 19.) The state court found a "valid
27 tactical basis" for objecting to accomplice instructions. (Id.)
28 "Whether a particular decision by counsel was a tactical one is a

1 question of fact, and the state court's resolution of that issue
 2 enjoys a strong presumption of correctness." Holsomback v. White,
 3 133 F.3d 1382, 1386-87 (11th Cir. 1998); see Berryman v. Morton,
 4 100 F.3d 1089, 1095 (3d Cir. 1996).

5 "The relevant question is not whether counsel's choices were
 6 strategic, but whether they were reasonable." Roe v. Flores-
 7 Ortega, 528 U.S. 470, 481 (2000). "Whether a particular tactical
 8 decision was a reasonable one, however, is a question of
 9 law" Holsomback, 133 F.3d at 1387.

10 In Bonin, the Ninth Circuit explained the Strickland
 11 performance standard: "Because we use an objective standard to
 12 evaluate counsel's competence, once an attorney's conduct is shown
 13 to be objectively reasonable, it becomes unnecessary to inquire
 14 into the source of the attorney's alleged shortcomings." Bonin v.
 15 Calderon, 59 F.3d 815, 838 (9th Cir. 1995) (finding that attorney's
 16 alleged drug use was not relevant). The Eleventh Circuit came to a
 17 similar conclusion in Chandler v. United States, 218 F.3d 1305,
 18 1315 n.16 (11th Cir. 2000):

19 "There are countless ways to provide effective assistance
 20 in any given case." [Citation omitted.] No lawyer can
 21 be expected to have considered all of the ways. If a
 22 defense lawyer pursued course A, it is immaterial that
 23 some other reasonable courses of defense (that the lawyer
 24 did not think of at all) existed and that the lawyer's
 pursuit of course A was not a deliberate choice between
 course A, course B, and so on. The lawyer's strategy was
 course A. And, our inquiry is limited to whether this
 strategy, that is, course A, might have been a reasonable
 one.

25 In considering a claim of ineffective assistance, "[a] fair
 26 assessment of attorney performance requires that every effort be
 27 made to eliminate the distorting effects of hindsight"
 28 Strickland, 466 U.S. at 689. "With the benefit of long and deep

1 reflection," Barnes now believes he would have done things
2 differently. (See Lodgment No. 5, Barnes Decl. at 6.) This,
3 however, does not make his performance unreasonable.

4 To establish that his attorney's performance was deficient,
5 Trevino must show that "counsel made errors so serious that [he]
6 was not functioning as the 'counsel' guaranteed the defendant by
7 the Sixth Amendment." Strickland, 466 U.S. at 687. Barnes's
8 shortcomings do not fall to this level. He did not render
9 deficient performance by failing to bring a second motion for a
10 severance based upon defenses which were not truly irreconcilable.
11 See James v. Borg, 24 F.3d 20, 27 (9th Cir. 1994) (holding that
12 "failure to make a futile motion does not constitute ineffective
13 assistance of counsel"); Morrison v. Estelle, 981 F.2d 425, 429
14 (9th Cir. 1992) (finding no ineffective assistance of appellate
15 counsel for failure to make an argument that would not have been
16 successful).

17 After Trevino's motion to sever and Gutierrez's motion for
18 separate trials were both denied, there is no reason to believe
19 that a further motion to sever, based on inconsistent defenses,
20 would have been granted. Finally, even if the Court were to find
21 that Barnes's performance was deficient due to his failure to
22 investigate the viability of a motion to sever because of
23 inconsistent defenses, the failure to show prejudice precludes
24 relief.

25 2. Prejudice

26 Petitioner cannot establish prejudice because he has not shown
27 he would have been granted a severance, especially in light of the
28 court's ruling on the earlier motions. Because Trevino and his

codefendants were not asserting truly irreconcilable defenses, this argument for a severance is not persuasive and was unlikely to succeed. There are no facts to suggest the judge would have ruled differently. See McQueen v. Scroggy, 99 F.3d 1302, 1316 (6th Cir. 1996) (finding no prejudice from decision not to seek a separate trial "since it is clear that any such motion would have been denied[]"); Collier v. United States, 92 F. Supp. 2d 99, 105 (D.P.R. 2000) ("[B]ecause a motion for a severance would have been unsuccessful, Petitioner's claim of ineffective assistance of counsel on that ground must fail.")

Furthermore, Trevino was not prejudiced by Barnes's failure to seek severance on this alternate ground, because if tried separately from his codefendants, the same evidence would have been admitted against Petitioner. (See Lodgment No. 11, Trevino, No. D017215, slip op. at 20.) Kinsey would have testified, and Barnes would have been confronted with the same tactical choice of whether to inform the jury that Kinsey was an accomplice who entered a plea agreement with the prosecution. (Id. at 19-20.) Trevino cannot show he was prejudiced by his counsel's failure to file a second motion for severance. Thus, the district court should **DENY** Trevino's second claim.²

² In Petitioner's Traverse, Trevino's counsel further argues that Petitioner was denied the right to a fair trial under the Fifth and Fourteenth Amendments when the court refused to grant a severance. (Traverse 19-22.) Counsel also alleges that the joint trial violated Trevino's Sixth Amendment right to confront and cross-examine witnesses against him, as set forth in Crawford v. Washington, 541 U.S. 36 (2004). (Id. at 21.)

"A Traverse is not the proper pleading to raise additional grounds for relief." Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir. 1994). Although Crawford was decided in 2004, neither of these claims were presented to the state court on direct appeal or collateral review, before or while this action has been pending. (See Lodgment No. 4, Appellant's Opening Brief, Trevino, No. D017215; Lodgment No. 5, Pet., Trevino, No. D018750.) Thus, they have not been exhausted in state court. 28 U.S.C.A. § 2254(b) (West 2006); see Rose v. Lundy,

C. Trial Counsel's Objection to Accomplice Instructions Did Not Deprive Petitioner of His Right to Effective Assistance of Counsel.

Trevino's third ground for habeas relief is that "he was denied effective assistance when his counsel objected to instructions that could have informed the jury that witness Joseph Kinsey . . . was an accomplice." (Am. Pet. 5-7; Traverse 9-16.) Kinsey was one of the four men in the car during the shooting. (Lodgment No. 2(g), Rep.'s Tr. vol. 9, 2619; Lodgment No. 2(h), Rep.'s Tr. vol. 10, 2788.) He agreed to plead guilty to shooting at an unoccupied vehicle in violation of California Penal Code section 247(b) in exchange for testifying against the other involved parties. (Lodgment No. 2(a), Rep.'s Tr. vol. 2, 284.) Kinsey testified that Trevino shot the victim and that Trevino said he shot the victim because the victim may have seen his face or the license plate of their car. (Lodgment No. 2(g), Rep.'s Tr. vol. 9, 2630; Lodgment No. 2(h), Rep.'s Tr. vol. 10, 2816-18.) Petitioner argues that if the accomplice instruction had been given, the jury would have reached a different verdict:

Had Barnes insisted on the accomplice instructions and insisted on the jury knowing about Kinsey's very favorable plea agreement with the prosecution, the jury would have viewed Kinsey's testimony in an entirely different light and would have had a reasonable doubt as to whether petitioner premeditated before firing the gun.

(Am. Pet. 12.)

455 U.S. 509, 522 (1982). Because they are unexhausted and not properly raised in the First Amended Petition, the Court would ordinarily not consider these new claims. Nevertheless, an unexhausted claim may be denied on the merits. 28 U.S.C.A. § 2254(b)(2) (West 2006). The Court, in Whorton v. Bockting, No. 05-595 (U.S. Feb. 28, 2007), recently decided that the rule set forth in Crawford is not retroactive, which precludes relief on Trevino's confrontation claim.

1 The state appellate court determined that Barnes had a
 2 "reasonable basis" for his decision regarding Kinsey's accomplice
 3 status. (Lodgment No. 11, Trevino, No. D018750, slip op. at 14.)
 4 Kinsey's signed plea agreement specified that he was to testify
 5 "fully and truthfully," and Barnes believed "introduction of the
 6 plea bargain documents . . . would be detrimental to his client."
 7 (Id. at 14.) These factual findings are presumed correct.

8 **1. Reasonableness of Counsel's Performance**

9 In California, when an accomplice testifies under a plea
 10 agreement, the court has a sua sponte duty to instruct the jury
 11 according to CALJIC Nos. 3.10-3.13, 3.18. See People v. Gordon, 10
 12 Cal. 3d 460, 466, 516 P.2d 298, 301, 110 Cal. Rptr. 906, 909
 13 (1973). These instructions state that the accomplice's testimony
 14 must be corroborated and that the jury should view it with caution.
 15 See CALJIC Nos. 3.10-3.13, 3.18 (West 2005).

16 The reasonableness of counsel's actions depends on the facts
 17 of the case, "viewed as of the time of counsel's conduct."
 18 Strickland v. Washington, 466 U.S. at 690. Petitioner contends:
 19 "[Barnes] had no time to think about any of it and decided to go
 20 along with the others [and object to accomplice instructions]
 21 because it seemed like a good thing to do. His decision was
 22 completely uninformed" (Traverse 12.)

23 The trial court discussed the accomplice instructions with
 24 counsel on May 12 and May 27, and both times Barnes joined in a
 25 request with the codefendants' counsel not to instruct the jury on
 26 accomplice testimony. (Lodgment No. 3(c), Rep.'s Tr. vol. 4, 66-
 27 70, May 12, 1992; Lodgment No. 2(1), Rep.'s Tr. vol. 14, 3759-60,
 28 May 27, 1992.) During a discussion with the court about voir dire

1 questions to prospective jurors, defense lawyers gave the trial
2 court their reasons for not discussing accomplice testimony and for
3 objecting to accomplice instructions.

4 Codefendant Connelly's attorney stated that although he wanted
5 to cross-examine Kinsey about his "deal with the district
6 attorney's office," he did not want Kinsey's plea agreement
7 admitted into evidence because it "contains a lot of self-serving
8 endorsements of his testimony" which would prove he was telling the
9 truth. (Lodgment No. 3(c), Rep.'s Tr. vol. 4, 66.) Codefendant
10 Gutierrez's attorney did not want the plea bargain referred to at
11 all, because if the jury knew what Kinsey pled guilty to, it would
12 speculate on the other defendants' culpability in relation to
13 Kinsey's, since they were all in the car when the shooting
14 occurred. (Id. at 67.) Connelly's attorney changed his position
15 and joined in that reasoning; he then withdrew his request to get
16 into the plea bargain. (Id. at 67-68.) Barnes agreed and said, "I
17 subscribe to it then, wholeheartedly." (Id. at 68.) The pros and
18 cons of referring to Kinsey as an accomplice were fully discussed
19 by the attorneys for the three codefendants.

20 Barnes made it clear that he was making a tactical choice to
21 object to giving accomplice instructions, and in making that
22 objection, he chose not to ask Kinsey about the plea agreement.
23 (Lodgment No. 3(c), Rep.'s Tr. vol. 4, 68-70.) On May 27, 1992,
24 during a discussion about jury instructions, Barnes noted that
25 accomplice instructions "might have been appropriate if my client
26 were to be tried alone. In fact, I would have virtually insisted
27 on it." (Lodgment No. 2(1), Rep.'s Tr. vol. 14, 3759-60.) This
28

1 reflects Barnes's consistent strategic decision that his client was
2 better served by excluding evidence of Kinsey's plea bargain.

3 An attorney does not render ineffective assistance by failing
4 to request jury instructions or by objecting to proposed
5 instructions that are inconsistent with his trial theory. Butcher
6 v. Marquez, 758 F.2d 373, 377 (9th Cir. 1985). Barnes's trial
7 strategy involved admitting that Trevino was the shooter but
8 arguing that the shooting was not premeditated and that Petitioner
9 did not conspire with anyone to commit the shooting. (See Lodgment
10 No. 2(m), Rep.'s Tr. vol. 15, 3997-4003, May 28, 1992.) Kinsey
11 refuted this theory by testifying that Trevino stated he shot the
12 victim to avoid being identified. Barnes decided to attack
13 Kinsey's credibility as a witness rather than as an accomplice, and
14 Barnes did this by pointing out inconsistencies in Kinsey's
15 testimony. (Id. at 3997-99, 4046-48.)

16 Although Trevino contends his counsel made the wrong decision
17 regarding Kinsey's accomplice status, at the time of the trial,
18 Barnes had a reasonable basis for that decision. He and other
19 defense counsel believed the introduction of the plea bargain
20 documents, which would result from the designation of Kinsey as an
21 accomplice, would be detrimental to their clients. Although Barnes
22 indicated that in a separate trial he might have chosen
23 differently, this was not a separate trial. (Lodgment No. 11,
24 People v. Trevino, D017215, slip op. at 14.) Counsel's tactical
25 decision did not constitute ineffective assistance.

26 Lankford v. Arave, 468 F.3d 578, recently cited by Trevino,
27 does not change this result. In Lankford, two brothers were tried
28 for a double murder in separate state court trials. Id. at 580.

1 Bryan Lankford testified for the prosecution at Mark's trial.
2 "Under cross examination, Bryan admitted at trial that he expected
3 to receive an indeterminate life sentence in return for his
4 testimony." Id. at 580 n.1. The attorney for Mark Lankford
5 requested three jury instructions regarding accomplice testimony.
6 One instruction told the jurors that accomplice testimony may be
7 considered even though not corroborated by other evidence; the
8 second informed the jurors that accomplice testimony needed to be
9 corroborated; and the third defined corroboration. (Id. at 582-
10 83.)

11 Idaho law precludes the use of accomplice testimony to support
12 a conviction unless it is "corroborated by other evidence." Id. at
13 584. The federal district and appellate courts both found "no
14 reasonable tactical advantage in requiring an erroneous instruction
15 that would allow the jury to give greater weight to Bryan's
16 testimony." (Id. (footnote omitted).) The Ninth Circuit noted:
17 "In this case, '[c]ounsel's errors with jury instructions were not
18 a strategic decision to forego one defense in favor of another.
19 They were the result of a misunderstanding of the law.'" Id.
20 (quoting United States v. Span, 75 F.3d 1383, 1390 (9th Cir.
21 1996)).

22 This is where Lankford and Trevino part company. Trevino's
23 attorney did not misunderstand the law. He made the strategic
24 decision not to inquire about Kinsey's plea bargain to avoid the
25 rehabilitative effect the plea agreement might have. Barnes
26 decided to impeach Kinsey on other matters.

27 "[S]trategic or tactical decisions on the part of counsel are
28 presumed correct, unless they were completely unreasonable, not

1 merely wrong." Moore v. Marr, 254 F.3d 1235, 1239 (10th Cir.
2 2001). Petitioner has not shown that Barnes's objection was
3 "completely unreasonable," and accordingly, it does not rise to the
4 level of deficient performance. This prong of the ineffective
5 assistance claim is lacking.

6 **2. Prejudice**

7 Nevertheless, even if counsel rendered ineffective assistance
8 by failing to request accomplice instructions, "the controlling
9 issue is whether the attorney's failure to request the instructions
10 prejudiced the defendant." Bonin, 794 F. Supp. at 970. "In
11 assessing prejudice, the reviewing court should consider such
12 factors as whether the accomplice's testimony was corroborated,
13 whether the trial court gave general credibility instructions, and
14 whether defense counsel questioned the accomplices' credibility
15 during closing argument." Id. (citing United States v. Bosch, 914
16 F.2d 1239, 1248 (9th Cir. 1990)). In another setting, the court
17 held that the petitioner received ineffective assistance of counsel
18 when his trial attorney did not request an accomplice instruction
19 because the only direct evidence linking petitioner to the crime
20 was the accomplice's testimony. Freeman v. Class, 95 F.3d 639,
21 641-42 (8th Cir. 1996).

22 Trevino was not prejudiced by his counsel's objection to
23 accomplice instructions. If they had been given, the jury would
24 have received evidence of Kinsey's plea agreement, which would have
25 offset the admonition to view his testimony with distrust. (See
26 Lodgment No. 11, Trevino, No. D017215, slip op. at 15.)
27 Additionally, the jury was already aware of Kinsey's involvement
28

1 because he admitted being in the car when the shootings occurred.
2 (Id. at 16.)

3 Besides Kinsey's testimony, there was substantial
4 corroborating evidence that pointed to Trevino's guilt. (Lodgment
5 No. 11, People v. Trevino, D017215, slip op. at 15-16.) For
6 example, Carlos Mallard testified that Trevino asked Gutierrez
7 "what was up with the nine" prior to the shooting. (Lodgment No.
8 2(g), Rep.'s Tr. vol. 9, 2529.) A nine-millimeter handgun matching
9 the murder weapon and ammunition were found in Petitioner's
10 bedroom. (Lodgment No. 2(f), Rep.'s Tr. vol. 8, 2316; Lodgment No.
11 2(i), Rep.'s Tr. vol. 11, 3060, 3062, 3065-66; Lodgment No. 11,
12 People v. Trevino, D017215, slip op. at 15.) Angela Knecht
13 testified that when the four men returned to Connelly's apartment,
14 she heard Trevino say that his hand was shaking when the gun went
15 off. (Lodgment No. 2(j), Rep.'s Tr. vol. 12, 3398.)

16 The corroborating evidence in Trevino's case distinguishes it
17 from Lankford. There, the court wrote: "[W]e must ask whether,
18 given proper instructions, there is a 'reasonable probability' that
19 the jury would have found Bryan's testimony [against his brother,
20 Mark] unsupported." Lankford, 468 F.3d at 588. The Ninth Circuit
21 found that the corroborating evidence implicated both Lankfords.
22 Id. at 589. Accordingly, there was a reasonable probability that
23 with proper instructions on corroboration, "the jury would not have
24 convicted Mark of first degree murder." Id. The same cannot be
25 said here. The statements Trevino made to others coupled with the
26 handgun and ammunition found in his bedroom are sufficient
27 corroboration.

28

1 Petitioner adds that instructing the jury with CALJIC No.
2 2.11.5 increased the prejudicial impact of the failure to give
3 accomplice instructions. (Traverse 15.) CALJIC No. 2.11.5
4 instructs the jury not to discuss or consider why a person that may
5 have been involved in the crime is not a defendant in the trial.
6 (Lodgment No. 1(a), Clerk's Tr. vol. 2, 251.) The trial court gave
7 CALJIC No. 2.11.5 over the objections of all three defense
8 attorneys. (Lodgment No. 2(1), Rep.'s Tr. vol. 14, 3776, May 27,
9 1992.)

10 The court of appeal found that the trial court properly gave
11 the instruction because it "was entirely consistent with Barnes's
12 tactical decision to join with the other codefendants' objection to
13 the giving of accomplice instructions and precluding any evidence
14 of Kinsey's plea bargain to be presented to the jury." (Lodgment
15 No. 11, Trevino, No. D017215, slip op. at 17-18.) CALJIC No.
16 2.11.5 is generally not given when the unjoined perpetrator
17 testifies at trial. (Id. at 17.) It is excluded because a
18 perpetrator who is testifying usually will be asked about his
19 status, making the instruction unnecessary. (Id.) In this case,
20 however, the defense strategy was not to inform the jury of
21 Kinsey's plea bargain; the instruction was consistent with that
22 strategy. (Id.)

23 Petitioner claims that by giving CALJIC 2.11.5, the trial
24 court stripped the jury of the ability to assess Kinsey's
25 credibility, "apart from his demeanor on the stand and his prior
26 inconsistent statements." (Traverse 15.) The jury, however, was
27 also instructed with CALJIC 2.20, concerning the general
28 credibility of witnesses. (Lodgment No. 1(a), Clerk's Tr. vol. 2,

1 253.) This instruction informed the jury of several bases that it
2 could use to discredit Kinsey's testimony. This instruction states
3 that in determining witness credibility, the jury may consider,
4 among other things, the existence of an interest or motive to lie
5 and any inconsistent statements made by the witness. (Id.) Barnes
6 used his closing statement to highlight inconsistencies in Kinsey's
7 testimony, argue that Kinsey was a "pleaser" whose testimony could
8 not be trusted, and that Kinsey had a "constituency" and had "to
9 please somebody." (Lodgment No. 2(m), Rep.'s Tr. vol. 15, 4048.)
10 There is little to suggest that the jury would have made a
11 different assessment of Kinsey's credibility if the jury was not
12 instructed on CALJIC 2.11.5 and instead allowed to inquire into
13 Kinsey's status as an unjoined perpetrator.

14 In light of all the evidence presented at trial, Petitioner
15 has failed to show a reasonable probability that giving an
16 accomplice instruction would have brought about a different
17 verdict. Accordingly, the district court should **DENY** Petitioner's
18 third claim for relief.

19 V. CONCLUSION

20 For the reasons stated above, the district court should **DENY**
21 Trevino's First Amended Petition for Writ of Habeas Corpus.

22 This Report and Recommendation will be submitted to United
23 States District Court Judge Irma E. Gonzalez, pursuant to the
24 provisions of 28 U.S.C. § 636(b)(1). Any party may file written
25 objections with the Court and serve a copy on all parties on or
26 before March 26, 2007. The document should be captioned
27 "Objections to Report and Recommendation." Any reply to the
28

1 objections shall be served and filed on or before April 6, 2007.
2 The parties are advised that failure to file objections within the
3 specified time may waive the right to appeal the district court's
4 order. Martinez v. Ylst, 951 F.2d 1153, 1157 (9th Cir. 1991).
5

6 Dated: March 6, 2007


Ruben B. Brooks
United States Magistrate Judge

8 cc: Judge Gonzalez
9 All parties of record
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